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ASSUMPTION OF RISK UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

ON April 22, 1908, executive approval was given to the act of Congress known as the Federal Employers' Liability Act; which, stripped of its verbiage irrelevant to this discussion, is as follows:

"That every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . of such employee.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void. . . ." [1]

[1] The constitutionality of this statute was sustained in Mondou *v.* New York, N. H. & H. R. R. Co., 223 U. S. 1, 50 (1912), upon the following ground:

"The natural tendency of the changes described is to impel the carriers to avoid

In *Seaboard Air Line Ry.* v. *Horton*[2] the court held that "by the phrase 'any statute enacted for the safety of employees,' Congress evidently intended federal statutes such as the Safety Appliance Acts and the Hours of Service Act"; and then proceeded to place upon the fourth section the following interpretation:

"It seems to us that sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk — perhaps none was deemed feasible."

The doctrine of assumption of risk, which the court thus engrafts upon the statute, is a common-law doctrine by which the employee,

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or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

In that case the court also said:

"We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce."

In Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59, 66 (1913), it is said:

"We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the states. Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample. 'The subject,' as observed by this court in Second Employers' Liability Cases, 'is one which falls within the police power of the state in the absence of legislation by Congress.' . . . By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of power which is granted in express terms must supersede all legislation over the same subject by the states."

[2] 34 Sup. Ct. 635, 639 (1914).

guilty of no fault, was denied recovery, notwithstanding his injury resulted from a danger created by the employer's negligence, if, after becoming chargeable with knowledge of the danger, he continued in the service without complaint. It is a doctrine against the injustice of which, in its application to modern railroad service, the legislation of the states has been chiefly directed.

If it be true that no question of law is to be regarded as finally decided until it has been rightly decided, the question whether this common-law doctrine is to be construed into the act should still be an open one, — certainly until it has received more thorough consideration than was given it in the case of *Seaboard Air Line Ry.* v. *Horton*,[3] or in any other case in which a similar conclusion has been reached. The question is vital. Its decision necessitates a judicial determination of the character and purpose of the act, — whether the legislation was in furtherance of the policy evinced in the legislation of the states, or is in fact a reactionary measure designed to displace state legislation to the extent that the abolition of assumption of risk by the states had inured to the benefit of employees of interstate carriers.

If the present trend of judicial decision shall be adhered to, it is obvious that the act is worse than nugatory so far as concerns any beneficial result to interstate employees, in comparison with the rights secured to them under state legislation which the act supplants; and that the act, viewed as a regulation of interstate commerce, with this destructive principle of the common law engrafted upon it, so far from having a tendency "to promote the safety of the employees and to advance the commerce in which they are engaged," in fact relegates the subject to the crude and artificial rules of the common law, except as to that comparatively small class of "defects and insufficiencies" which result from the violation of statutes enacted for the safety of employees.

The Hours of Service Act does not deal with instrumentalities. The Safety Appliance Acts cover only a part of the appliances used in connection with "cars and engines." The common-law immunity to the carrier from the consequences of its own negligence would, therefore, be reinstated as to everything of a physical nature embraced in the comprehensive terms "machinery, track,

[3] *Supra.*

roadbed, works, boats, wharves, or other equipment," and even as to "cars, engines, and appliances," except to the limited extent to which appliances to be used in connection with cars and engines have been prescribed by statute.

Judicial construction that thus makes the system of federal liability a legal hybrid, — partly statutory and partly common-law, — rests apparently upon the theory that the act does not "cover the subject," and that what is regarded as an omission in the act is to be "pieced out" by recourse to the common law. In other words, the conclusion reached in *Seaboard Air Line Ry.* v. *Horton*,[4] is a departure from the principle stated in *Michigan C. R. Co.* v. *Vreeland*.[5]

Since, also, *Seaboard Air Line Ry.* v. *Horton* originated in the state of North Carolina, where assumption of risk has been abolished by statute, it is difficult to perceive from what source the court derived the common-law principle which it applied. Without considering the legal basis or source of authority of the common law as a rule of decision in the United States, the court assumed the existence of a *common-law* doctrine of assumption of risk, which state legislation is powerless to repeal, and which is available to "piece out" what was conceived to be an omission in the fourth section to deal fully with common-law assumption of risk.

The court apparently assumed that the act of Congress occupies with respect to the common law the same relation as an act of Parliament, and that the Liability Act, although enacted in the exercise of the exclusive power of legislation vested in Congress by the commerce clause of the Constitution, and as a distinct act of federal sovereignty, is to be regarded merely as an act amendatory of the common law. And what common law? Not the common law of the state, for the state had abolished the principle which the court applied.

Proceeding upon the assumption of such a common-law principle, which is beyond the power of the state to repeal, the court gave no apparent consideration to the fact that the unconditional liability created by the first section excludes that form of assumption of risk which at common law operates as a bar to recovery when the injury results "in whole or in part from the negligence of

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[4] *Supra.* [5] *Supra.*

any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Before proceeding to a technical construction of the act, or attempting to show that the fourth section, instead of giving rise to a defense in favor of the carrier, in fact extends the liability created by the first section, let us consider the anomalous character of the act with this doctrine of the common law construed into it.

The decision in the Horton Case imputes to Congress the inexplicable purpose of imposing the highest degree of liability for failure to comply with statutes enacted for the safety of employees, and, at the same time, of affording immunity to the highest degree of negligence of which the carrier can be guilty with respect to all other instrumentalities not covered by such statutes.

Can any intelligible reason be given why Congress should have intended thus to discriminate between such appliances as driving-wheel brakes, automatic couplers, grab-irons, draw-bars, running-boards, steps, and locomotive ash-pans, on the one hand, and bridges, trestles, roadbeds, tracks, ties, machinery, works, boats, wharves, and all other kinds of appliances and equipment, on the other? Can any reason be conceived why Congress, for the purpose of promoting the safety of employees or advancing interstate commerce, should have imposed absolute liability for the failure to equip cars and engines with the statutory appliances, not to be affected by the employee's knowledge of the omission nor to be mitigated by his contributory negligence, and yet, with respect to all other instrumentalities, have given to the carrier the benefit of the common-law defense of assumption of risk with the encouragement to negligence which that defense affords?

The explanation of the provision of the third section, forbidding the defense of contributory negligence even in mitigation of damages, and of the fourth section, forbidding the defense that the risk was one of the assumed "risks of his employment," when the injury to the employee results from the violation of a statute, is that Congress intended to compel compliance with its statutes by forbidding any defense in case of their violation. But, since it is impracticable to regulate by statute the whole matter of the construction, equipment, and maintenance of an interstate rail-

way, to the extent that the character and condition of the equipment is not, and in the nature of things cannot be, prescribed by statute, the existence of any "defect or insufficiency" due to the carrier's negligence, from which injury to its employee results in whole or in part, is made the conclusive test of liability.

When such a defect or insufficiency and its causal relation to the injury are shown, the liability is absolute and subject only to mitigation to the extent, to be determined by the jury, that the injury is attributable to the employee's contributory negligence.[6]

In the Horton Case the court draws the following distinction between "contributory negligence," which the act provides shall not bar a recovery, and "assumption of risk," which the court declares shall bar recovery:[7]

"Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee."

Can any reason be given why Congress should have intended to forbid recovery to an employee guilty of no fault, and yet allow recovery to an employee guilty of contributory negligence, which necessarily implies that he was chargeable with the same *knowledge* of the danger which resulted in the injury? Or can any reason be given why Congress should have intended to forbid recovery to an employee for merely remaining in the service with knowledge and without complaint, and yet allow recovery to an employee who, with the same *knowledge*, expressly and for valuable consideration contracted to exempt the carrier from liability?

Besides the policy of the act and the ground of its constitutionality declared in *Mondou* v. *New York, N. H. & H. R. R. Co.*,[8]

[6] Baltimore & O. R. Co. *v.* Darr, 204 Fed. 751 (1913); Grand Trunk W. Ry. Co. *v.* Lindsay, 201 Fed. 836 (1912); Wright *v.* Yazoo & M. V. R. Co., 197 Fed. 94 (1912); Illinois Cent. R. Co. *v.* Nelson, 203 Fed. 956 (1913); St. Louis, I. M. & S. Ry. Co. *v.* Conley, 187 Fed. 949 (1911); Philadelphia, B. & W. R. R. Co. *v.* Tucker, 35 App. D. C. 123, 220 U. S. 608 (1910); and by the trial court in Pedersen *v.* Delaware, L. & W. R. R. Co., 229 U. S. 146 (1913).

[7] *Supra*, p. 639.

[8] *Supra.*

already quoted, we have the following statement of the court in *Pedersen* v. *Delaware, L. & W. R. R. Co.*:[9]

". . . Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'"

Is it conceivable that the policy of the act, as thus twice declared by the court, could be more effectually defeated than by introducing into it the common-law defense of assumption of risk as to all dangers arising from defects and insufficiencies, except from violations of statutes? This defense encourages negligence. As observed by Judge Jaggard in *Rase* v. *Minneapolis, St. P. & S. S. M. R. Co.*:[10]

"The reasoning by which it is sought to be justified, carried to its logical conclusion, tends to result in this paradox: The more grossly the master is negligent, the more certain is the assumption of risk by the servant, and the master's exoneration. If the master be more careful, then the more doubtful is the servant's assumption of risk, and the more probable is the master's liability. The employer who is successfully careful and he who is extremely careless are equally protected. The exercise of care is discouraged, and a premium is put on negligence."

The doctrine of assumption of risk which thus gives immunity to the employer's negligence and compels the servant, as a last resort, to quit the service and stop the business in order to escape irremediable injury, is at variance with the ground upon which the constitutionality of the act was sustained. Such a doctrine had its origin in the relation of master and servant under conditions which affected the interests only of the employer and employee. It is an incubus upon the interstate commerce of the country with the important public interests which that commerce subserves. Under its baleful influence upon commerce, in time of peace trainmen, on becoming chargeable with knowledge of the carrier's negligence, must cease the transportation of passengers, mails, and freight, and in time of war, the transportation of troops as well.

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[9] 229 U. S. 146, 151.

[10] 107 Minn. 260, 265, 120 N. W. 360, 363 (1909).

The doctrine of assumption of risk originated in the case of *Priestley* v. *Fowler*.[11] There is no more similarity between the reasons and policy upon which that decision is based, and the reasons and policy which called for the legislation embodied in the Federal Employers' Liability Act, than there is between a "butcher's van" and the physical equipment of an American transcontinental railway.

It is inconceivable that Congress should have intended to fetter the interstate commerce of the present day with the crude doctrines laid down by Lord Abinger in *Priestley* v. *Fowler*, which involved the question of liability of a butcher for injury to his servant resulting from an overloaded "butcher's van," — doctrines against which many of the courts have protested and the injustice of which, in their application to modern industrial conditions, has brought forth the various acts of remedial legislation in all the countries in which the common law of England has prevailed.

The interstate carriers of the United States are public service corporations. The commerce in which they are engaged and the instrumentalities by which that commerce is carried on were not conceived of at the time of *Priestley* v. *Fowler*. On that commerce depend the wealth, the happiness, and the civilization of the country. Employees of interstate carriers are indispensable instrumentalities or agencies in that commerce. The commerce must go on; employees cannot stop.

To free commerce from the fetters of the common law, — "to impel the carrier to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines," and thereby "to promote the safety of the employees and to advance the commerce in which they are engaged," [12] — was the enlightened purpose of the act and the constitutional justification for this exertion of congressional power.[13]

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[11] 3 Mees. & W. 1 (1837).

[12] Mondou *v.* New York, N. H. & H. R. R. Co., *supra*, p. 51.

[13] Senator Dolliver, discussing upon the floor of the Senate the Act of April 22, 1908, said:

"The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions."

Senator Borah, advocating the amendment of April 5, 1910, declared that,

"It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress, to shift the burden of

Before the enactment of this statute there was no federal law of negligence. The federal courts in the exercise of their jurisdiction in cases involving liability of railway companies to their employees, whether engaged or not in interstate commerce, applied the law of negligence as a part of the law of the state where the injury was occasioned. This statute, for the first time, creates a substantive federal right in favor of the employee, distinct from the right theretofore given him by the law of the state.[14]

The system of federal liability created by the act is exclusive of the law of the states upon the subject, which means that it is exclusive of the grounds of liability available to the employee under the state law, whether common-law or statutory, and of the grounds of defense, whether common-law or statutory, afforded by the law of the state to the interstate carrier. Just as the employee must look to the act for his cause of action, so the carrier must look to the act for its defenses. Unlike the liability under the law of the state, which originated in the common law and was subject to all the defenses available at common law, the system of federal liability is purely of statutory creation. The terms in which liability is imposed are exclusive of defenses which would defeat that liability.

There is no common law of the United States, except that in the construction of the Constitution and acts of Congress recourse may be had to the common law for the purpose of interpreting the technical terms employed, which otherwise would be unintelligible.[15] The common law is essentially the law of the states. It exists as a part of the law of the states by virtue of its adoption by the states, and to the extent only that it is not in conflict with state institutions and is not repealed by state legislation. Although,

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loss resulting from these casualties from 'those less able to bear it' and place it upon those who can, as the Supreme Court said in the *Taylor case*, 211 U. S. 281, 'measurably control their causes.' . . . The passage of the original act and the perfection thereof by the amendment herein proposed stand forth as a declaration of public policy to radically change, so far as congressional power can extend, those rules of the common law which the President in a recent speech at Chicago characterized as 'unjust.'" See also Doherty on Employers' Liability Act, p. 61.

[14] Thornton on Federal Employers' Liability Act, § 1, pp. 4–5, note.

[15] Wheaton *v.* Peters, 8 Peters (U. S.) 591 (1834); Pennsylvania *v.* Wheeling & B. B. Co., 13 How. (U. S.) 518 (1851); Smith *v.* Alabama, 124 U. S. 465 (1888); Moore *v.* United States, 91 U. S. 270 (1875); Gatton *v.* Chicago, R. I. & P. R. Co., 28 L. R. A. 556 (1895).

when the question is one of general and not merely of local jurisprudence, the federal courts will apply their own construction of the common law, irrespective of the decisions of the state courts, they nevertheless do so in administering the common law as the law of the states.[16]

In states which have repealed the common-law defense of assumption of risk,[17] the defense cannot be set up as a bar to recovery in any case whether arising under the act of Congress or out of purely intrastate service. In cases arising under the act of Congress in states where this defense has not been abolished, the defense is not available, for the reason that the act cannot be "pieced out" by the law of the state. In other words, if the act of Congress cannot, as is universally conceded, be "pieced out" by legislation of the states repealing the common-law defense, how can it be "pieced out" by state legislation originally adopting the common law, or by this principle of the common law after it has been repealed by the states? In *Western Union Tel. Co.* v. *Commercial M. Co.*,[18] Mr. Justice McKenna said:

"We have seen that one division of the supreme court of the state was of the view that if the prohibition rested on the common law its validity could not be questioned. We cannot concede such effect to the common law and deny it to a statute. Both are rules of conduct proceeding from the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the states. But however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it. How, then, can it have an efficacy that the statute changing it does not possess?"

From the nature of legislation by Congress, in the exercise of its power to regulate commerce, such legislation is exclusive of the law of the states. The defenses permissible under the act must be found in the express or implied provisions of the act. The question, therefore, is not whether the common-law defense of assump-

[16] Smith *v.* Alabama, *supra.*

[17] Hough *v.* Railway Co., 100 U. S. 213 (1879).

[18] 218 U. S. 406, 416 (1910).

tion of risk, as such, is available to the carrier; but whether it appears from the terms of the act that Congress intended to *create*, in favor of the carrier, a defense similar to that of common-law assumption of risk.

The object of the statute was to create in favor of the employee of a common carrier coming within its purview absolute liability for injury resulting "*in whole or in part*" from its *negligence* with respect to its *physical* instrumentalities, represented by its "cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," or from the negligence of its *human* agencies, represented by its "officers, agents, or employees"; and to make it negligence *per se* for such carrier to violate "any statute enacted for the safety of employees." As a corporation can act only through its officers, agents, or employees, such "defects or insufficiencies" as may occur in its physical appliances will necessarily be attributable to its human agencies. The two grounds of liability will therefore overlap each other.

The purpose of Congress to create unconditional liability when the injury results "in whole or *in part*" from such *negligence* is manifest from the provisions of the third and fifth sections, "that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery," and "that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

The provisions of the third section, "that no such employee who may be injured . . . shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury," and of the fourth section, "that in any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the *risks of his employment* in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury," indicate the determination of Congress to enforce the requirements of "statutes enacted for the safety of employees," by exempting the employee in the one case from the imputation of contributory

negligence, and in the other from the defense that dangers resulting from such violation were among the "risks of his employment."

The theory that the effect of the fourth section is to adopt the common-law doctrine that the employee by continuing in the service assumed the abnormal risks resulting from a "defect or insufficiency," due to the *negligence* of the carrier, unless its conduct involved also a violation of a statute enacted for the safety of employees, proceeds upon a misconstruction of the words "risks of his employment," and an inadvertent leaving out of consideration of the relation between the common law of England and legislation by Congress in the United States.

The words of the fourth section, "risks of his employment," mean the ordinary risks inherent in the business, — the unavoidable risks which are intrinsic, notwithstanding the performance by the carrier of its personal duties. They do not include the "secondary and ulterior" risks arising from abnormal dangers due to the employer's negligence.

The object of this section was not to adopt by *implication* the common-law defense of assumption of the risk of such abnormal dangers; its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the "risks of his employment" assumed by the employee.

Before the enactment of this statute, the carrier might exempt itself from liability under the common-law doctrine of the "choice of methods." The common-law duty of the master was only to exercise ordinary care to provide the servant with reasonably safe appliances. He was not required to use any particular appliance. Independently of the Safety Appliance Acts, the selection by the master of his appliances was a choice in which the courts would not undertake to control his discretion; it was not incumbent upon him to choose this or that specific appliance, but only to exercise ordinary care to provide reasonably safe appliances.[19]

[19] In Norfolk & W. Ry. Co. *v.* Cromer, 101 Va. 667, 671, 44 S. E. 898, 899 (1903), the court thus states the common-law doctrine of the employer's choice of methods: "Courts and juries cannot dictate to railway companies a choice between methods, all of which are reasonably adequate for the purpose to be subserved"; and this doctrine has been applied to relieve the employer of civil liability even when the injury resulted from a violation of a safety statute.

In Nottage *v.* Sawmill Phoenix, 133 Fed. 979, 981 (1904), where the safety appli-

When it is considered that the first section imposes liability only for *negligence*, the purpose of the fourth section to extend that liability becomes apparent. The word "negligence" is a common-law term. It is therefore to be construed according to its common-law meaning. The act does not make the carrier an insurer of its employee's safety. By the first section it makes the carrier unconditionally liable for the *negligence* of its officers, agents, or employees and for its *negligence* with respect to its appliances. But at common law the authorities are in conflict as to whether the violation of a "statute enacted for the safety of employees" is negligence.[20] If it was not negligence, that is, if it involved no breach of duty to the *employee*, the risk of injury therefrom was a "risk of his employment." To remove doubt on this point and to make the violation of such a statute negligence *per se* under the system of federal liability, the fourth section provides that the employee "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury."

Let us consider more closely the significance of the words "risks of his employment." It is to be observed that the statute nowhere uses the phrase "assumption of risk." The words of the statute

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ance act of Washington imposed a penalty for its non-observance, but contained no language similar to that of the fourth section of the act of Congress, the court said:

"This is a penal statute, enacted by the Legislature in the exercise of the police power of the state, and it contains no provision purporting to affect in any way the rules of law applicable to civil actions. It gives no hint of an intention to confer upon injured employees any new right enforceable in an action to recover damages, nor does it express a legislative intent to change the common law by abolishing defenses recognized by the common law."

In Glenmont L. Co. *v.* Roy, 126 Fed. 524, 528 (1903) (*contra*, Narramore *v.* Cleveland, C. C. & St. L. Ry. Co., 96 Fed. 298 (1899)), which involved a similar statute, in the opinion delivered by Judge Sanborn and concurred in by Judge (now Mr. Justice) Van Devanter, it is said:

"The master is not required to supply the best, newest, or safest appliances to secure the safety of his servants; nor is he bound to insure the safety of the place or of the appliances he furnishes. His duty in this respect is discharged when he has exercised ordinary care to furnish a place and appliances reasonably safe and suitable for the use of his employees. . . . The factory act of Minnesota, which requires employers to guard or fence dangerous machinery so far as possible, does not abolish the defense of assumption of risk. It does not deprive parties of their right to contract regarding the risks of their avocations."

[20] 5 Labatt on Master and Servant, 2 ed., § 1909.

are "the risks of his employment," which include only the normal risks incident to the service, not enhanced by the employer's negligence. While the phrase "assumption of risk" in its modern acceptation includes the ordinary risks as well as those due to the employer's negligence, the words "risks of his employment" refer only to the ordinary risks, the existence of which implies no negligence on the part of the master.[21]

If full force be given to the maxim "*expressio unius exclusio est alterius*," as applied to the words of the fourth section, "such employee shall not be held to have assumed the *risks of his employment* in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," what would be the effect of the maxim? It would be that those "*risks of his employment*" which do not result from the violation of a statute enacted for his safety would remain as the "risks of his employment," which under the act are still assumed, and the existence of which would not imply negligence on the part of the employer. The words "risks of his

[21] The proposition that the servant contractually assumes the risks of his employment, says Mr. Labatt, "of course amounts merely to an assertion . . . of the general principle that proof of negligence on the master's part is a prerequisite to the establishment of the servant's right to maintain an action." 5 Labatt on Master and Servant, 2 ed., § 1547.

"A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *primâ facie*, a servant does not assume any risk which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incident to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties." 3 Labatt on Master and Servant, 2 ed., § 894.

The English rule is thus stated by Blackburn, J., in Morgan *v.* Vale of Neath Ry. Co., 5 Best & S. 570, 579 (1864), affirmed in L. R. 1 Q. B. 149 (1865):

"If the master has, by his own personal negligence or malfeasance, enhanced the risk to which the servant is exposed, beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or supplying defective machinery, or the like, no defense founded on this principle can apply; for the servant does not, as an implied part of his contract, take upon himself any other risks than those naturally incident to the employment."

In Texas & Pac. Ry. Co. *v.* Harvey, 228 U. S. 319, 321 (1913), it is said:

"At the common law the servant assumes the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharge of the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of his employer's negligence in performing such duty."

employment" have a definite meaning distinct from the enhanced risks "due to the employer's negligence." An application of the maxim to one risk of the first class would certainly not justify the implication of risks of the second class.

Courts which hold that the common-law defense of "assumption of risk" is available under the act to bar recovery when the injury is attributable to the employer's negligence have fallen into the error, partly at least, by failing to distinguish between the significance of this phrase and the more restrictive words of the statute, "risks of his employment."

The phrase "assumption of risk" in its original significance embraced only such risks as were inherent, or at least involved no breach of common-law duty. In this sense the risks included are synonymous with those embraced in the phrase "risks of his employment." By subsequent application the phrase "assumption of risk" was extended to embrace the *enhanced* risks due to the employer's negligence, and thus was made to include two legal conceptions essentially different.

In its original sense, assumption of risk was a bar to recovery because, there being no breach of common-law duty, there could be no cause of action; while in its secondary sense the negligence of the employer gave rise to a cause of action which might be defeated by proof of the employee's continuance in the service with knowledge of the enhanced danger. The essentially different characters of the two defenses covered by the common-law phrase "assumption of risk" are clearly shown in the note to *Scheurer* v. *Banner R. Co.*:[22]

"Assumption of risk, as applied to the ordinary risks of the service, is merely a rhetorical phrase used to connote the idea that the master is not an insurer against injuries resulting from dangers which cannot be removed by the exercise of due care upon his part. In the second sense, assumption of risk has a vastly different significance; it implies negligence on the part of the master and a *primâ facie* liability, but it also implies a waiver of the effects of that negligence if it injures the servant."

"Assumption of risk," in its original sense, in which the risks assumed are equivalent to the "risks of his employment," except

[22] 28 L. R. A. N. S. 1207, 1221 (1910).

as modified by the act, is an available defense; but "assumption of risk" in its secondary sense, as an "implied agreement" or a voluntary exposure to danger implied in the maxim "*volenti non fit injuria*," upon which the employer may rely to exonerate itself from liability for an injury resulting from a "defect or insufficiency" due to its own negligence, or as a form of contributory negligence with respect to such defect or insufficiency, is not an available defense under the act.

Assumption of risk, as a defense in its original sense, is *restricted* by the fourth section, which strikes from the category of "risks of employment" the violation by the carrier of "any statute enacted for the safety of employees." Assumption of risk, as a defense in its secondary sense, is *excluded* by the first section when the injury results "in whole or in part" from the *negligence* of the carrier or any of its officers, agents, or employees.

The differences between the common-law and federal systems of liability may be more clearly presented by a comparative statement of the common-law doctrines and the statutory provisions creating the federal liability.

At common law the initial defense open to the employer was that the injury was not due to any negligence for which it was responsible, that is, that the injury did not result from the breach of any duty which it owed to the employee, but resulted from an inherent danger of the business, or *wholly* from some fault of the employee.

If the injury resulted from a danger inherent in the business, such danger was, by the implied terms of the contract of service, assumed by the employee as a "risk of his employment," and among the risks so assumed was the danger of injury from the negligence of his fellow-servant and, according to numerous decisions, the violation by the master of "statutes enacted for the safety of employees."

The act admits in favor of the carrier these two defenses in bar of the action: (1) that the injury was due wholly to some fault of the employee, and (2) that the injury was due to a "risk of his employment," except to the extent that the latter defense is modified by the first and fourth sections of the act. The modifications are: (1) that the defense of fellow-service is displaced by the first section, and (2) that the violation "of any statute enacted for the safety of employees," which did not at common law neces-

sarily give rise to civil liability, is made negligence *per se* by the fourth section.

These are the only defenses in bar of the action, and they are open to the carrier not because they are common-law defenses and, *as such*, may be set up, but because they are defenses which are necessarily to be implied from the terms of the act. The act excludes all defenses in bar of recovery when the injury results "in whole or in part" from the negligence of the carrier or its officers, agents, or employees.

At common law, although the injury resulted from a "*defect or insufficiency*" in physical appliances admittedly "*due to the negligence*" of the employer, there could be no recovery if the employee continued in the service without complaint after becoming chargeable with knowledge of the danger arising from such defect or insufficiency.

This form of "assumption of risk" is not available under the act. The terms in which liability is imposed exclude this defense. The liability is unconditional. Congress did not employ the language "shall be liable in damages, *subject to the common-law defense of assumption of risk*," and without language, expressly or by implication, adopting this defense it cannot be invoked as a bar to recovery.

At common law there could be no recovery for an injury resulting from the negligence of a fellow-servant, the risk of injury from that cause being one which the employee was, by the implied terms of his contract, held to have assumed as a "risk of his employment."

Likewise the terms in which liability is imposed exclude this defense. The liability is unconditional. Congress did not employ the language "shall be liable in damages, *subject to the common-law defense of fellow-service.*" It is therefore generally conceded that the defense of fellow-service is not available under the act. It should be observed, however, that the reason for the exclusion of this defense is, not that Congress was repealing the common law, but that, in the exercise of its independent power, it saw fit to make the principle "*respondeat superior*" a part of the system of federal liability as to all classes of "officers, agents, and employees."

At common law, although the injury resulted *in part* from a "defect or insufficiency" due to the employer's negligence, there could be no recovery unless such defect or insufficiency was the *proximate*

cause of the injury, without the intervention of any other efficient cause for which the employer was not responsible.

The terms in which liability is imposed exclude this defense, the first section creating unconditional liability when the injury results "in whole or *in part*" from the negligence of the carrier or any of its officers, agents, or employees. To entitle the employee to recover it is not necessary that such negligence should be the sole or even the proximate cause; it is sufficient if it is in the line of causation.[23]

At common law, although the injury resulted from a "defect or insufficiency" due to the negligence of the employer, or from the negligence of any of its officers, agents, or employees, occupying the relation of vice-principal, there could be no recovery if the employee by his own negligence proximately contributed to the injury.

Under the third section "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

At common law also, when the employer's liability might not be otherwise evaded, recovery might still be defeated by proof of a contract, entered into by the employee, exempting the employer from liability.[24]

This defense is not available under the act, the fifth section expressly providing "that any contract, rule, regulation, or device whatsoever, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent, be void."

The act, when given what seems its proper construction, becomes what its distinguished authorship entitles it to be, — a perfect specimen of constructive legislation; while the introduction into its remedial provisions of this incongruous doctrine of the common law renders it altogether unintelligible.

Assumption of risk, in its secondary sense, as a common-law defense in bar of recovery when the employee was chargeable with knowledge of the employer's negligence, nullifies the first section

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[23] Grand Trunk *v.* Lindsay, *supra.*

[24] Griffiths *v.* The Earl of Dudley, 9 Q. B. Div. 357 (1882).

of the act to the extent that that section imposes liability for injury resulting "in part" from "*any* defect or insufficiency" due to the negligence of the carrier. Congress realized that a variety of other causes might operate more or less directly in the production of an injury, such as the employee's continuance in the service with knowledge of the danger or his contributory negligence with respect to the danger. To avoid escape upon these or other grounds the act imposes unconditional liability for an injury resulting in whole or *in part* from such defect or insufficiency.

This defense nullifies the first section of the act to the extent that the language "shall be liable . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier" has been regarded as "displacing" the common-law defense of assumption of risk of the negligence of the fellow-servant.

If assumption of risk is displaced only in cases involving the violation of "statutes enacted for the safety of employees," why is not the common-law defense of the employee's assumption of the risk of injury from the negligence of his fellow-servant still available? The negligence of a fellow-servant is not the violation of "any statute enacted for the safety of employees," unless the liability act is itself such a statute.[25] How, then, is this form of assumption of risk excluded while assumption of risk of the carrier's negligence with respect to its instrumentalities is not excluded? Is it because the defense of the fellow-servant is not a part of the defense of assumption of risk?

"An early, if not the earliest application of the phrase 'assumption of the risk' was the establishment of the exception to the liability of a master for the negligence of a servant when the person injured was a fellow-servant of the negligent man." [26]

Courts which hold that assumption of risk is a bar to recovery for injury resulting from a "defect or insufficiency" due to the carrier's negligence concede that assumption of risk cannot be invoked to defeat recovery for injury resulting from the negligence of a fellow-servant. And why not? The liability for both kinds of

[25] Philadelphia, B. & W. R. R. Co. *v.* Tucker, *supra.*

[26] Schlemmer *v.* Buffalo, R. & P. Ry. Co., 220 U. S. 590 (1911); Farwell *v.* Boston & W. R. R. Corp., 4 Met. (Mass.) 49 (1842).

negligence is imposed by the same language; both must stand or fall together. But for the unconditional liability imposed by the first section for both forms of negligence there would be stronger reason for holding that assumption of risk might be invoked, under the fourth section, to defeat recovery for the negligence of the fellow-servant than for the negligence of the carrier. The risk of injury from the negligence of the fellow-servant is a "risk of his employment" which, at common law, is assumed by the employee,[27] while the risk of injury from the employer's negligence, whatever may be the basis of its assumption at common law, is not a "risk of his employment" assumed by the employee.[28]

This defense nullifies the third section of the act. It is impossible to reconcile the common-law doctrine that the employee's continuance in the service with knowledge of the risk resulting from a "defect or insufficiency" is a bar to recovery, with the peremptory provision of the third section that "in all actions hereafter brought against any such common carrier . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery."

The employee's *knowledge* of the defect or insufficiency, and of the consequent danger, is an element or factor common to both defenses of assumption of risk and contributory negligence.[29] Can this same knowledge be at once a bar to recovery when considered as an element of "assumption of risk" and not a bar to recovery when considered as an element of "contributory negligence"? Is it conceivable that such an anomalous state of the law was intended by Congress, — that Congress intended to preserve against contributory negligence the right of action which it created only to have that right of action defeated by "knowledge," one of the elements of contributory negligence, called by the name of "assumption of risk," — and thus to "palter with us in a double sense"?[30]

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[27] Norfolk & W. R. Co. *v.* Nuckol, 91 Va. 193, 21 S. E. 342 (1895).

[28] 3 Labatt on Master and Servant, 1 ed., § 894.

[29] Norfolk & W. R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489 (1905); Buckner *v.* Richmond & D. R. Co., 72 Miss. 873, 18 So. 449 (1895); 1 Labatt on Master and Servant, 1 ed., §§ 207, 279-*a*, 296.

[30] "Whenever the evidence," says Mr. Labatt in stating the common-law rule, "suggests that the servant *knew* of the extraordinary risk which causes the accident,

The two defenses are so inextricably related that it is impracticable to discover the point at which the employee's "knowledge" as a bar to recovery, when considered as an element of assumption of risk, shall cease to be a bar to recovery when considered as an element of contributory negligence.

In *Narramore* v. *Cleveland, C. C. & St. L. Ry. Co.*,[31] Judge Taft said:

"Assumption of risk is . . . the acquiescence of the ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence . . . is that action or non-action in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences." [32]

Assumption of risk, then, consists in *knowing the danger and acting carefully;* while contributory negligence consists in *knowing the danger and acting carelessly.* Contributory negligence *includes,* as a part of its elements, every fact constituting assumption of risk. There cannot, therefore, be an assumption of risk, as a legal conception distinct from contributory negligence, which does not become merged into contributory negligence when the conduct of the employee goes to the extent of charging him with contributory negligence.

This defense, if indeed its basis is an implied contract, renders nugatory the fifth section of the act, that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which

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the jury should be instructed regarding the legal consequences of such knowledge as justifying the inference both of an assumption of the risk and of contributory negligence."

[31] *Supra,* p. 304.

[32] In Schlemmer *v.* Buffalo, R. & P. Ry. Co., 205 U. S. 1, 12, it is said:

"Assumption of risk . . . obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the specific knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances *known* to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. . . . Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of *degree* rather than of kind."

shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." [33]

It is not the purpose of this article to discuss the *rationale* of common-law assumption of risk of the employer's negligence. If Mr. Labatt states correctly that "the conception underlying the servant's assumption of a known risk is essentially that of an implied agreement," it is not to be reconciled with the fifth section. If Judge Putnam, in *Central Vermont Ry. Co.* v. *Bethune*,[34] correctly states that "There is nothing of the kind. It is merely a practical rule of common sense, which . . . is in itself independent of the contract of service or any other contract," the academic distinction between assumption of risk and contributory negligence disappears.

Of the "common sense" theory suggested in the Bethune Case it is sufficient to observe that it is at variance with the legislative intelligence underlying all acts of remedial legislation, including the third and fourth sections of the liability act as construed by the court, so far as concerns dangers resulting from the violation of statutes; and, assuming as it does that the employee *voluntarily* exposes himself to the danger of pain, maiming, and death, is at variance with every rational human instinct. It is at variance too with the opinion of the court in *Baltimore & P. R. R. Co.* v. *Landrigan*: [35]

"We know of no more universal instinct than that of self-preservation, — none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundation than that expressed in the instruction objected to."

It is evident that the common-law defense, in bar of recovery, based upon the employee's continuance in the service with knowledge of a "defect or insufficiency" due to the negligence of an interstate carrier "in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," whether called by the name of "assumption of risk" or "contributory negligence," is not admissible under any express or implied provision

[33] Doherty on Federal Employers' Liability Act, p. 102.

[34] 206 Fed. 868 (1913).

[35] 191 U. S. 461, 474 (1903).

of the act, and that the introduction of the defense into the system of federal liability would render the act nugatory so far as concerns any beneficial result to interstate employees, — and worse than that, for the act of Congress supplants all the remedial legislation of the states, and, with this all-pervading doctrine of the common law judicially construed into the act, the last state of the interstate employee would be worse than the first.

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